



Generally Speaking

Comings and Goings

Alan Birnbaum joined the Anchorage Oil Gas and Mining Section as an Assistant Attorney General. Prior to joining us, Alan was a lawyer in the private and public sectors. After a clerkship with the U.S. District Court in Newark, N.J., Alan worked in the litigation department of Paul, Weiss, Rifkind, Wharton & Garrison in New York City. Alan then moved to Washington D.C. and the public sector where he served, in turn, as an Assistant U.S. Attorney and an Attorney-Adviser for the State Department.

Audra Hotchkiss joined the Fairbanks office as an Administrative Clerk I and serves as the receptionist. Audra comes to us from the private sector.

Gail Byers joined the Anchorage office as an Administrative Clerk III in the Collections and Support Section. She fills the position vacated by Abraham Weiss. Gail worked for over a year as a Legal Secretary for Martin A. Farrell, Jr. She also served as a Billing Specialist for Sisson and Knutson.

Iceola McDowell joined the Anchorage office as an Administrative Clerk I in the Child Protection/Human Services Section. Prior to joining the Department of Law, Iceola worked as a receptionist at the Ochsner Clinic Foundation in New Orleans. She was displaced by Hurricane Katrina and relocated to Anchorage in August of this year.

Jason Crawford left the Transportation Section's Fairbanks office for life on the "outside," as a solo practitioner in Fairbanks. The Transportation Section will miss Jason and wishes him the best of luck on all his future cases except the ones against us.

Jaye Johnson has taken over the Fiscal Travel Desk. Prior to joining the Department of Law, Jaye worked for the Department of Education and Early Development, Division of Administration as their Administrative Clerk II.

Jill Stone was recently promoted from the position of Paralegal II to Litigation Coordinator in the Child Protection Section. Jill has been with the Department of Law since August 1982 and she has worked in the Human Services/Child Protection Section her entire tenure. In her new position, Jill will supervise six Child Protection paralegals statewide.

Joan Wilson (AAG) relocated from the Transportation Section's Fairbanks office to its Anchorage office, to the chagrin of the Fairbanks group and the delight of the Anchorage group.

Jon Iversen joined the Anchorage Oil Gas and Mining Section as an Assistant Attorney General. He is originally from Cheyenne, Wyoming and came to Alaska to clerk for Judge Larry Card. After his clerkship, he worked for a couple of years for Eide, Miller & Pate, doing primarily litigation.

Ken Diemer joined the Anchorage Oil Gas and Mining Section as an Assistant Attorney General. Ken transferred from the Office of Special Prosecutions and Appeals, where he spent the

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last three and a half years in the Appellate Division. Before that he was the supervising attorney for Criminal Research Division of the Office of Staff Attorney for U.S. Court of Appeals for the Ninth Circuit for five years. Ken has also worked in private practice and clerked for the U.S. District Court in Anchorage.

Mike Weaver will join the Juneau Administrative Services Division on December 5th to work on collections and victim restitution. Mike joins the Department of Law after many years of service as an auditor with the Department of Labor.

Patricia Myers joined the Juneau office as a Law Office Assistant I in the Labor and State Affairs/Environmental Sections. Tricia comes to us from the National Marine Fisheries Services (she left in 2002). In her free time, she is a member of the Capital City Fire and Rescue Team.

Rory Darling joined the Juneau Administrative Services Division as Project Manager for Technology Upgrade. Previously he was a project management consultant in the private sector.

Samuel W. Cason recently accepted an offer to serve as a part-time attorney in the RAPA section. Sam, who has been working as a private practitioner in Anchorage, will join the section's public advocacy litigation team in January, 2006. He has previously served on the board of a railbelt electrical utility.

Shelby King joined the Anchorage office as a Law Office Assistant I in the Oil, Gas, and Mining Section. Prior to joining the Department of Law, Shelby worked as a Legal Assistant with Jim Christie and Associates and with the Law Office of Roger DuBrock. She has also worked as a Legal Secretary for Holmes, Weddle, and Barcott.

Wang Choe left the Child Protection/Human Services Section where he held the position of Administrative Clerk I to become a receptionist at the University of Alaska Anchorage.

Larry McKinstry (AAG) transferred from the Transportation Section in Juneau to the Labor and State Affairs Section in Anchorage. The Transportation Section will miss Larry.

CIVIL DIVISION

Child Protection

Litigation

WJ v. State. In this appeal, the father is asking the Alaska Supreme Court to reverse an order terminating his parental rights. Most of the issues in the case are fairly routine, but one issue before the Court is a matter of first impression: whether social workers have to provide services to a non-native putative father before paternity is established. The Supreme Court has ruled previously that in cases governed by the Indian Child Welfare Act (ICWA), active efforts for a putative parent are not required until paternity is established. The State filed its appellee's brief and is awaiting the father's reply. While most of our appellate cases are handled by Mike Hotchkinn and Megan Webb in the Opinions, Appeals and Ethics section, Senior AAG Dan Branch, in the Human Services Section, volunteered to help with this appeal.

New CINA Cases. The section opened many new Child in Need of Aid (CINA) cases as a consequence of the Office of Children's Services (OCS) becoming involved or taking custody of children discovered in unsafe circumstances.

In several cases, the children came to OCS's attention through APD. For instance, in one case APD officers went to a motel room to arrest a man, and instead discovered two children in the care of their intoxicated mother and grandfather. The mother recorded a .216 BAC and became combative with police. OCS has a history with this mother through another child in custody. In separate incidences, APD removed other children from the scene where the parent was highly intoxicated or children were found in the presence of a sex offender or surrounded by drug use and drug paraphernalia.

Drugs or alcohol were an issue in several new cases. OCS became involved with numerous children who tested positive for illicit drugs after they were born. Several new cases were filed involving parents either manufacturing or using methamphetamines. A number of young children were taken into custody because their parents were too intoxicated to care for them.

In some of these cases, domestic violence is an issue as well as substance abuse. For instance an intoxicated mother and her two-year-old arrived at the hospital with blood on them from a laceration to the mother's head which required stitches. The laceration was the result of a domestic violence incident where the child was in the home.

OCS took custody of several children in separate incidences because of assaults inflicted on them by their caregivers. In one incident, OCS took custody of an eight year old who disclosed physical assault by the mother and sexual assault by the mother's boyfriend. OCS also intervened and took custody of a two year-old after she was hospitalized for having a broken leg, a burn on her foot, a black eye, and a dent on her skull. OCS believes the injuries were caused by the mother or her boyfriend. Another child was taken into custody after his mother cut his throat with a knife and told him she was going to kill him. She kept the child out of school for 10 days after the incident, but when he returned to school he reported what had happened. A different child was taken into custody after she reported that her mother had punched her, knocked her down and stomped on her arms, resulting in bruising on much of her body. The child reported that her mother had been physically abusive for two years. Medical professionals believed the bruising was consistent with an assault. A mother who had repeatedly struck her child with a wire hanger also came to OCS' attention. OCS took custody of the seven year old who feared that her mother would drink again and hit her again. OCS also took custody of an infant with several suspicious injuries where the parent and caretaker's explanations were inconsistent with the medical evidence. OCS also acted to protect a child whose mother had moved back with a man whom the child reported had sexually abused her years ago and now continued to abuse her.

Miscellaneous

AAG Jan Rutherford is the office's new representative on the Children's Justice Act Task Force. The Alaska CJA Task Force was established in FY 1999 under the State of Alaska, Office of Children's Services. The mission is to identify areas where improvement is needed in the statewide response to child maltreatment, particularly child sexual abuse, and make recommendations and take actions to improve the system. The Task Force members represent

many different disciplines (law enforcement, judicial (criminal and civil), medical, child protection, defense attorneys, tribal law and policy, behavioral health, family advocates, juvenile justice, child advocacy centers, etc.) and regions of the state.

We are currently recruiting to fill a paralegal position in Anchorage, a new paralegal position in Fairbanks, and attorney positions in Nome and Anchorage.

Collections and Support

Supreme Court Refuses to Review Genetic Testing Order. The C&S section had another victory in the Alaska Supreme Court in November. AAG Susan Daniels successfully defended a Petition for Review in the Alaska Supreme Court. In a hotly contested paternity case, the alleged father filed a petition for review after the superior court ordered him to participate in genetic testing. The alleged father questioned the veracity and character of the biological mother and her sworn statement that he was the biological father. The Supreme Court denied the alleged father's petition for review. The matter now returns to the superior court for further proceedings. This is AAG Daniels third successful result in the Alaska Supreme Court over the past three months.

Commercial and Fair Business

Consumer Protection/Anti-Trust

State Sues Pharmaceutical Companies for Antitrust Violations Relating to Oral Contraceptives. Alaska joined 21 other states and the District of Columbia in a lawsuit against Warner Chilcott and Barr Pharmaceuticals alleging that these companies entered illegal agreements to restrain competition for the sale of Ovcon, an oral contraceptive. Barr is the only company approved by the FDA to sell a generic version of Ovcon. The complaint alleges that Warner Chilcott paid Barr \$20 million to keep its generic Ovcon off the market for five years, allowing Warner Chilcott to keep the price of the drug at super-competitive levels. These kinds of market allocation agreements are *per se* illegal under state and federal antitrust laws. The FTC filed a complaint against the companies on the same day the states filed theirs.

Settlement in Multistate Consumer Protection Investigation. Alaska and 36 states resolved a

multistate consumer protection investigation of fraudulent wire transfers through Western Union. Telemarketers who scam consumers through bogus sweepstakes or advance fee loans frequently use Western Union and other money transfer companies. Surveys conducted by seven states showed that almost 30 percent of wire transfers to Canada were fraudulent, with an average loss of \$1500 per consumer. Western Union signed an agreement with the states to improve printed warnings to consumers, to update its internal procedures for recognizing and preventing fraud, and to provide \$8 million in funding to the AARP Foundation to conduct a nationwide peer counseling/consumer education program designed to reach 3 million consumers.

Occupational Licensing (now the Division of Corporations, Business and Professional Licensing)

Decisions and Other Resolutions

Koller. On October 20, 2005, the State Medical Board adopted a memorandum of agreement ("MOA") between the Division and Kodiak physician John Koller based on Koller's practice of medicine for two months after his license lapsed in 2003. Under the MOA, Koller was fined \$10,000 (with \$8,000 suspended) and reprimanded. AAG Robert Auth represented the Division in this proceeding and negotiated the MOA with Koller's attorney the day before a disciplinary hearing was scheduled to begin.

Holiday Alaska. Administrative Law Judge (ALJ) David Stebing issued a proposed decision *in the Matter of Holiday Alaska*, a case involving suspensions of Holiday's tobacco endorsements following the convictions of three Holiday employees for selling tobacco to a minor. The ALJ recommended suspensions of 20 days and civil penalties of \$300 for each location where illegal sales took place. Commissioner Noll adopted the decision in its entirety on November 12, 2005. AAG Cynthia Drinkwater represented the Division in this matter.

Litigation

Nurse Sues State Over Release of Her Address. AAG Gayle Horetski recently submitted a witness list in the pending civil action *MaryJane Hinman v. State, Dept. of Commerce, Community, and Economic*

Development. The Board of Nursing is located in the Division of Corporations, Business, and Professional Licensing. The division posts the name and address of record of occupational license holders on the DCCED website so members of the public can readily access this public information. (Rare exceptions have been made when the licensee established that the posting of such information would place the licensee in actual physical danger.) Ms. Hinman is a registered nurse who uses her home address as her address of record with the Division and objects to the posting of that address on the DCCED website. Division staff explained to Ms. Hinman that she could use a post office box as her address of record for licensing purposes, but she declined to pay the box rental fee. Represented by attorneys for the Alaska Civil Liberties Union Foundation, Ms. Hinman has filed a lawsuit seeking a declaratory judgment that her home address is protected from release to the public by the Privacy Clause of the Alaska Constitution. She has also requested an injunction permanently restraining the Division from disclosing her address to the public in any form, including through the website. The State's position is that the Division is merely complying with the state public records laws (AS 40.25.100-40.25.220). Trial of the matter is set for April 2006 in Anchorage.

Insurance

Progressive Casualty. On November 1, AAG Nick Atwood had oral argument in *Progressive Casualty Insurance Company, et al ("Progressive") vs. Division of Insurance ("Division")*. Case No. 3AN-04-07290 Civ. The case is an administrative appeal to the superior court from the director's decision to disapprove an insurance rate filing. Although the director's decision was based on alternative grounds, Progressive's main argument is that the Division misinterpreted the effect of the recently enacted credit scoring law, found at AS 21.36.460. Progressive also argued that the court should invalidate recently proposed regulations that codify the Division's interpretation of the credit scoring law. Finally, Progressive argued that the credit scoring law, as interpreted by the Division, is preempted by the Fair Credit Reporting Act (FCRA).

On behalf of the Division, AAG Atwood argued that the court should affirm the director's decision on the basis that the rate rejected was unfairly discriminatory, a finding independent of the credit scoring law. AAG

Atwood also argued that the Division's interpretation of the credit scoring law was correct and that it would be inappropriate for the court to rule on the validity of regulations that are merely proposed. Finally, AAG Atwood argued that the FCRA does not preempt Alaska's credit scoring law because the latter affords more protection for the consumer and is not, in any event, inconsistent with the FCRA.

The case is in front of Judge Wolverton, who said he expects to issue a decision in December, 2005. Opposing counsel is Gary Zipkin.

Environmental

Litigation

Sterling ZipMart. A mediation before retired Judge Eric Sanders successfully resolved the allocation of underground storage tank insurance proceeds relating to the Sterling Zipmart gasoline station. Prior litigation had recovered the proceeds from Zurich American Insurance Company, the insurer of the station's owner, Whittier Properties.

As a result of a broken fill pipe, over 50,000 gallons of gasoline had been released into the soil and groundwater surrounding the station. The release contaminated the groundwater beneath the land of the Sterling Baptist Church, the Sterling Community Club and several private residences and businesses. At the October 6 mediation, DEC and the impacted landowners neighboring the station reached an agreement on how to divide the insurance proceeds and established the parties' respective obligations concerning future monitoring and treatment of drinking water wells. AAGs Rita Hoffmann, Breck Tostevin, and Cam Leonard represented the State at the mediation.

Coastal Transportation. Coastal Transportation, Inc., a Washington-based company, paid \$412,101 in civil assessments to resolve its liability for the illegal operation of its cargo vessels as tankers without approved oil spill contingency plans and without the required proof of financial responsibility to respond to oil spills.

The corporation paid the civil assessments to settle civil and criminal liability for illegal ship-to-shore fuel transfers in Alaska since 1984. The assessments were calculated to recoup the company's economic

benefits in not complying with the law over this long period of time. The company's illegal operations came to light when a Coastal Transportation ship, conducting a ship-to-shore transfer, spilled oil in Dutch Harbor in November 2003. AAG Breck Tostevin completed the settlement for DEC.

Human Services

Litigation

Talkeetna Weddings and Medicaid Waivers. Senior AAG Dan Branch is handling a few of the section's litigation matters, including *Knabe v. State*. Mr. Knabe brought this case to force the Bureau of Vital Statistics to remove from its records any reference to his Talkeetna marriage. In his complaint he alleged that the marriage ceremony had never taken place and that the marriage license and certificate that were filed with the state were prepared as a jest. On November 17, the superior court granted the State's motion to be dismissed as party to the case.

Bayless v. State is one of Branch's other active cases. Patsy Bayless received notice from the state Medicaid program that her application for continued waiver services was being denied. She requested an administrative hearing. Before the hearing could be conducted, her lawyer filed this class action suit against the State, in which she alleges that the notice she received violated her due process rights. The suit was filed after the State had reversed its denial of Bayless' waiver services. The State filed a motion to dismiss the case because Ms. Bayless hadn't exhausted her administrative remedies, didn't bring the case as an administrative appeal and because it is moot. The motion is pending. Ms. Bayless also filed a motion for summary judgment. The State's opposition is due November 28.

Case Dismissed for Lack of Standing. In rather contentious litigation, *Paul Fuhs v. Commissioner Joel Gilbertson and Providence*, the State and Providence prevailed on a motion to dismiss for lack of standing. Judge Gleason issued her decision late in November, and although there is still a companion administrative appeal, much of the case has been dismissed.

Putative Class Actions Defended. AAG Blair Christensen and Chief AAG Stacie Kraly continue to litigate various cases with the Northern Justice Project, including *Krone, Pierce and Okuley*. All three are

putative class actions and are in the class certification phase. Oral Argument regarding class certification in *Okuley* is scheduled for early January.

Subrogation/Liens

By the Numbers. As of November 25, 2005, the section has 442 open and resolved Medicaid subrogation/lien reimbursement files and 159 closed files. That is an increase of 48 open matters over last month's inventory. The section has closed/resolved 16 matters between November 1 and November 25. During that period of time, the section collected \$64,132.31 and is awaiting collection of \$270,049 from resolved matters. For year 2005 to date, a total of \$942,567.98 has been collected, for an average collection per claim of \$5,928. Projected collections are expected to exceed \$1.0 million by the end of 2005 calendar year.

State Joins as Amicus Before U.S. Supreme Court.

The State has joined with several other states in filing an Amicus brief in the U.S. Supreme Court in *Ahlborn v. Arkansas Department of Human Services*. In that matter, respondent Ahlborn was seriously injured in a motor vehicle accident. She applied and qualified for medical benefits under the Arkansas Medicaid program, administered in the state by appellee Arkansas Department of Human Services ("ADHS"). In applying for benefits, Arkansas law required Ahlborn to assign to ADHS her "right to any settlement, judgment, or award" she might receive from third parties, "to the full extent of any amount which may be paid by Medicaid for the benefit of the applicant." She received a lump sum settlement that did not allocate damages among her claims. Arkansas sought to enforce its right to be paid for the amount of Medicaid benefits Ahlborn received. The Eighth Circuit held that 42 U.S.C. 1396p(a)(1), the "anti-lien statute," generally prevents a state from attaching property of a recipient to reimburse the state for benefits paid under a state Medicaid plan.

The State expects the Supreme Court to resolve the issue of whether federal Medicaid law, which requires that a medical assistance recipient assign to the state any right to payment from a third party who is liable for the recipient's medical expenses, and which also prohibits the placement of a pre-death lien upon a recipient's "property," entitles the state to full reimbursement of Medicaid benefits paid on the

recipient's behalf from personal injury settlement proceeds, regardless of what portion of the settlement proceeds are designated as compensation for medical care.

Licensing

AAG Rebecca Polizzotto prevailed in a license revocation hearing for *Our House*. Respondent has appealed to superior court.

Chief AAG Stacie Kraly and AAG Rebecca Polizzotto will be conducting training on December 14 for various divisions affected by new legislation (SB125) addressed to licensing and regulation of medical or care facilities.

Regulations

AAG Kelly Henriksen continues to work on a number Medicaid related regulation projects that will have significant impact on the day-to-day administration of the state's Medicaid program. In addition, the second phase of the Certificate of Need regulations have been adopted and are with the section for review.

Labor and State Affairs

Alaska Industrial and Development and Export Authority

(AIDEA). The State filed suit on November 11 in superior court against the Fairbanks electric cooperative Golden Valley Electric Association (GVEA). The complaint is based on GVEA's failure to comply with terms of a 2000 settlement agreement between AIDEA and GVEA concerning the AIDEA-owned Healy Clean Coal Project (HCCP). AIDEA seeks a long-term lease to allow it to restart and operate HCCP. The settlement agreement obligated GVEA to give AIDEA a long-term lease to operate HCCP, but GVEA has refused to enter into a lease and to provide the site access that would allow operation of HCCP. The complaint also seeks \$167 million in damages, as measured by the net lost revenues from power sales resulting from AIDEA's inability to operate HCCP due to GVEA's breach of the settlement agreement. Senior AAG Brian Bjorkquist, AAG Mike Mitchell, and former Attorney General Charlie Cole, under contract, represent the State.

Elections. This month the State filed its answer in superior court in *Citizens for Ethical Government, William F. Fulton, Richard A. Sutton and Michael Busey v. State of Alaska, Division of Elections*. In this case Plaintiffs contend that the Division of Elections should have certified their application for a petition to recall Senator Ben Stevens. The Division denied the application because the petition did not satisfy the statutory requirements—specifically, the requirement to allege sufficient grounds for recall. Plaintiffs seek a court order to the Division to certify the application so that the recall petition can proceed to the next stage, circulation for signatures. Senator Ben Stevens has requested to intervene in the action. AAG Mike Barnhill represents the State.

Division of Motor Vehicles. Due to *Nevers v. State, Division of Motor Vehicles*, which on October 28 held that the exclusionary rule does not apply to driver's license revocation proceedings, the following drivers' license revocation appeals have been dismissed: *Anderson v. State, DMV*, Case No. 3AN-04-10216 Cl; *Camahan v. State, DMV*, Case No. 1JU-04-0925 Cl; *Stuhl v. State, DMV*, Case No. 3PA-05-1755 Cl. AAG Richard Postma has represented the State in these matters.

Retirement and Benefits. On November 4 the Alaska Supreme Court issued its decision in *PERS v. Morton*. A former state employee challenged the termination of his occupational disability benefits. His benefits were terminated when his actual earnings exceeded his pre-injury state earnings. He challenged the termination because, even though he was able to earn an income, he had not recovered from the injury. The court agreed and concluded that a PERS regulation providing that an occupationally disabled member is no longer eligible to receive occupational disability benefits when the member is employed and earns over 75% of the member's pre-injury income could not be applied to an employee earning income from a non-PERS covered employer. AAG Toby Steinberger and former AAG Keith Levy represented the State.

Workers' Compensation Appeals Commission. The section, through Chief AAG Jan DeYoung, supported the implementation of SB 130 and the creation of the Worker's Compensation Appeals Commission, which opened for business this month. Briefing on the challenge to SB 130 and the commission continues to be handled in the Opinions, Appeals and Ethics

Section by Senior AAG Paul Lyle and AAG Laura Bottger.

Special thanks: To AAGs Gina Ragle, Mike Barnhill, and Mike Mitchell for their work post-*Alaska Civil Liberties Union v. State of Alaska and Municipality of Anchorage* (Alaska 10/28/2005).

Legislation Regulations

During November 2005, the Legislation and Regulations Section spent an active month editing draft legislation for consideration by the governor for the 2006 legislative session.

The section also performed legal review of several regulations projects including 1. Department of Health and Social Services (Behavioral Rehabilitation Services; Health Care Facilities Licensure for Anesthesia, Physical Plant, and Dietetic Services); 2. Board of Psychologist and Psychological Examiners (Forms, Licensure, Supervision, and Definitions); 3. Department of Commerce, Community, and Economic Development (Occupational Licensing Fees); 4. Department of Revenue (Procedures Re: Permanent Fund Dividends); 5. Board of Fisheries (Sport Fishing Licensing Surcharges); 6. Professional Teaching Practices Commission (Crimes of Moral Turpitude); and 7. Department of Environmental Conservation (Air Quality and Portable Oil and Gas Operations; Fees for Seafood Processing Permit and Inspection Program).

Natural Resources

Patton v. State, CFEC. On November 14 the State filed its Reply to the Plaintiff's Opposition to the State's Motion for Summary Judgment in *Patton v. State, CFEC*, No. A04-0226 CV. The plaintiff in this action in U.S. District Court claims aboriginal rights to harvest fishery resources within Alaska's territorial waters, free from state regulation under the Limited Entry Act. Earlier in this action Judge Beistline denied Patton's request to enjoin operation of the Act pending a final judgment. Patton already has attempted to take an interlocutory appeal from that ruling to the Ninth Circuit. AAG John Baker represents the State in this case.

State of Alaska, 167 IBLA 156 (2005) (IBLA 2002-197). On November 1 the State received a favorable decision from the Interior Board of Land Appeals in *State of Alaska, 167 IBLA 156 (2005)*

(IBLA 2002-197). In this federal administrative appeal the IBLA reversed and remanded a BLM decision purporting to terminate a public access easement to the mean high water line (MHWL) at Humpy Cove near Unalaska. BLM's premise for the decision – it's *third* attempt to justify termination of this easement – was that the easement was never properly reserved, due to ambiguous language in the Interim Conveyance to Ounalashka Corporation.

The IBLA upheld the State's standing to appeal, despite the State's conveyance of the tidelands to the City of Unalaska under AS 38.05.825, because (1) the State retains ownership of submerged lands seaward to the 3-mile limit; and (2) the State has a reversionary interest and public trust doctrine easements in the conveyed tidelands under AS 38.05.825.

On the merits, the Board agreed with Alaska that if BLM wished to alter the patent (which contained the easement reservation), it should have pursued "a judicial action to reform the patent or termination subject to standards BLM must consider in the first instance." The Board held that BLM "may not avoid its obligations ... simply by declaring that the easement never existed." The IBLA remanded to BLM with the suggestion that the agency consider a negotiated resolution.

Ounalashka Corp., the fee landowner above the MHWL, has the right to appeal the IBLA decision to the U.S. District Court. AAG John Baker represents the State in this matter.

Division of Agriculture. AAG Sabrina Fernandez attended the Board of Agriculture and Conservation meeting and provided legal support regarding the sale of the Mount McKinley Meat & Sausage Company. She also wrote a cease and desist letter to the Mat-Su Farm Bureau requiring that it discontinue use of the Alaska Grown symbol. This action was taken after the Bureau announced, at the statewide Farm Bureau meeting, its intention to take over the symbol and also filed for federal trademark protection, claiming ownership of the symbol.

Federal Fisheries Legislative Issues Continue to Heat Up. AAG Steven Daugherty assisted the Alaska Department of Fish and Game ("ADF&G") with review of drafts of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act and

with drafting of legislative language for proposed amendments. A new staff draft was released on November 7, 2005 and the bill was introduced by Senator Stevens on November 15, 2005. Markup of the bill is expected to occur in December 2005 and January 2006. AAG Daugherty is continuing to assist ADF&G with review of the bill and with development of language for proposed amendments.

Chignik Co-op Fishery Appeal. On November 22, Senior AAG Lance Nelson filed the State's reply brief with the Supreme Court in the second appellate round of the Chignik Co-op Fishery litigation, *State v. Grunert*. In the first round, the Supreme Court ruled in March of this year that the salmon co-op regulation was invalid, largely because it allowed permit holders to receive an economic benefit without actually fishing, which the Court found to be fundamentally inconsistent with the Limited Entry Act. In this second round of litigation, the State is appealing the Superior Court (Judge Morse) decision that an emergency regulation adopted by the Board of Fisheries in May, that required active participation by every permit holder in the 2005 co-op, still violated the Limited Entry Act. The parties expect an expedited decision by the end of February 2006.

Oil, Gas and Mining

Production Tax Settlement. The Oil, Gas and Mining section assisted the Department of Revenue in negotiating and implementing a settlement of oil and gas production tax assessments against ConocoPhillips for 2001. Pursuant to the settlement, ConocoPhillips has paid an additional \$2,135,000 in taxes and interest.

Successful Defense of Department of Revenue's \$3 Billion Valuation of TAPS Stands. In March 2005, the Department of Revenue assessed the value of TAPS at \$3 billion for the oil and gas property tax under AS 43.56. The TAPS owner companies, Alyeska Pipeline Company and the three local jurisdictions that receive a portion of the tax, Fairbanks North Star Borough, City of Valdez, and North Slope Borough, appealed the decision to the State Assessment Review Board (SARB). AAG Bonnie Harris defended the Department's decision in a four-day hearing resulting in the SARB upholding the assessment. The city and municipalities then appealed to superior court and the TAPS owners and Alyeska Pipeline cross-appealed. In November, the

parties stipulated to a dismissal of the superior court appeal.

Opinions, Appeals and Ethics

Appellate Coordination Work

In its role as coordinator for all civil appeals, the section set up two moot courts for division attorneys with Alaska Supreme Court arguments. Moot courts were held in November for Chris Kennedy in *State v. Native Village of Nunapitchuk* and in *Murkowski v. Alaska AFL-CIO*, and for Richard Postma in *Bowen v. State*. Six attorneys participated as moot court judges.

The section also assigned reviewers for twenty appeals in November, and evaluated one appeal request.

Executive Branch Ethics Work

For ethics matters, most of the work done and advice given is confidential by law. However, it is possible to disclose that, in addition to work on other confidential ethics matters during November, AAG Dave Jones provided five letters of advice to former state employees about the Ethics Act's restrictions on their employment after leaving state service.

Litigation

State defends Workers' Compensation Appeals Commission against challenge by AKPIRG. This month AAG Laura Bottger and Senior AAG Paul Lyle completed superior court briefing on cross-motions for summary judgment in a constitutional challenge to Ch. 10, FSSLA 2005 filed by AKPIRG on September 30th.

The new statute, enacted during the 2005 special session, creates the Workers' Compensation Appeals Commission. The commission is an executive branch agency allocated to the Department of Labor and Workforce Development. It is independent of the Workers' Compensation Board and reviews decisions of the board that are appealed to it. The appeals commission's decisions are binding on the commission and the board unless reversed by the supreme court. The new law also withdraws jurisdiction from the superior court to review final agency decisions on

workers' compensation claims issued by the appeals commission. Instead, judicial review is to be conducted directly by the Alaska Supreme Court.

AKPIRG claims that the new appeals commission is an "executive court" that violates article IV of the Alaska Constitution, which requires a unified judiciary, and that the legislature had no authority to diminish the jurisdiction of the superior court. The State argues that the appeals commission was constitutionally created because it is a quasi-judicial agency established under article III, sections 22 and 26 of the constitution. The State also argues that the legislature constitutionally changed the jurisdiction of the superior court under article IV, section 1 of the constitution, which grants the legislature exclusive authority to prescribe the jurisdiction of the courts.

Decisions

The Alaska Supreme Court issued decisions in two cases handled by Senior AAG Mary Lundquist. In *Hugh P. v. State*, the Supreme Court affirmed the trial court's order terminating a father's parental rights to his child. The Court found that since the father refused to participate in his case plan for almost four years, he had abandoned his child under AS 47.10.011(1) and AS 47.10.013. The Court also found that DFYS (now OCS) made active efforts to prevent the breakup of this family as required under ICWA. Mary Lundquist prepared the brief for the state.

In *ITMO Sara J., Joel J., and Morris J.*, the Court ruled in the state's and adoptive mother's favor. The case involved the adoption of three Yupik children by a non-Native single woman in Bethel following the termination of the natural parent's parental rights. The Native Village of Kasigluk and a Native couple challenged the adoption, arguing that the court must apply the tribe's social and cultural standards to determine whether good cause existed to deviate from ICWA's placement preferences, and that, applying the tribe's social and cultural standards, good cause did not exist in this case. The court held that although the prevailing social and cultural standards of the Indian community apply to a dispute regarding the suitability of preferred placements, these standards do not govern the good cause determination. It also concluded that there was substantial evidence to support the trial court's findings that any harm to the children caused by living outside the village was

outweighed by the potential harm from being separated from their adoptive placement; the children's special behavioral and educational needs could be met in Bethel, but not in the village where the tribe wanted them to be placed; and that the adoptive mother could meet the children's cultural needs in Bethel.

Regulatory Affairs & Public Advocacy (RAPA)

Stipulated Settlement in Electrical Utility Fuel Supply

Case. Docket U-04-104 was opened by the Regulatory Commission of Alaska (RCA) to investigate the fuel supply procurement practices of Bethel Utilities Corporation (BUC). Prefiled testimony of RAPA's expert witness identified discrepancies in pricing for fuel oil for BUC compared to that paid by other utilities in western Alaska.

BUC and the AG/public advocate jointly filed a stipulation with the RCA resolving disputed issues on October 26, 2005. Under the stipulation, the utility agrees that any future fuel supply contract will be submitted in advance to the RCA for approval and that all costs making up the proposed pricing structure for fuel costs will be segregated such that individual cost components can be reviewed for reasonableness. The RCA has not yet acted on the stipulation.

RAPA Case Intervention Summary Update. As of November 2, 2005, RAPA is involved in nineteen open dockets before the RCA. That number includes seventeen adjudicatory matters in which the AG/public advocate has elected to participate as a party and two rulemaking dockets in which the AG/public advocate has offered formal comments. RAPA also monitors numerous other matters before the RCA and provides policy analysis to the AG, and through the AG to the Governor's office, as requested. Most recently, the Section Chief prepared an OpEd briefing for the Governor on statewide energy issues.

New Cases

Alaska Electric Light & Power, U-05-90. This is a rate case filing by the electric utility serving Juneau, Douglas and the Kennecott Greens Creek Mine on Admiralty Island. The utility seeks a 5.2% rate increase. The AARP has filed a Petition to Intervene. No procedural schedule has been set at this time.

Enstar Credit Card Billing Practices, U-05-54.

Enstar, the sole natural gas utility providing service in Southcentral, seeks to permanently outsource a part of its billing practices to a third party vendor. In particular, this outsourcing would require Enstar's ratepayers who wish to pay their utility bills via credit cards to use the third party provider to do so. The vendor would charge ratepayers a fee directly for the service.

This arrangement presents a question of first impression because the outsourced (credit card) billing/collection service has historically been a core utility function subject to the RCA's regulatory oversight. RAPA discovery has recently commenced. Hearing is scheduled for April, 2006.

Transportation

Personnel News

AAG Susan Urig celebrated 25 years of service in the Transportation Section, beginning on October 27, 1980.

The Anchorage office's nearly-official rhymester John Steiner celebrated his 50th birthday surrounded by an enormous crowd of totally-unofficial rhymesters, all of whom prepared poems to roast and honor John. The Transportation Section's Jeff Stark, Sherene Jensen, and Barb Peterson also turned 50 this year, raising the section's level of experience and wisdom to new heights.

Transportation Section AAG Leone Hatch traveled through India and Bhutan, where she experienced, but luckily was unharmed by, the earthquake that devastated so much of Pakistan.

Transportation Section LOA II Barb Peterson deserves kudos for reaching out to help the Torts and Workers Compensation Section with a Supreme Court brief and the Environmental Section with a new set of regulations.

Transportation section supervisor Jim Cantor gave a speech to the International Right of Way Association about a new U.S. Supreme Court decision interpreting the government's power of condemnation for economic development purposes. It is expected that this topic will be discussed in the legislature this year.

Construction Claims

Supreme Court Rejects Contractor's Claims, Finds for the State. The Supreme Court issued a favorable Memorandum Opinion and Judgment in a long-boiling construction dispute. A contractor, Jim Psenak Construction, lodged a claim against DNR for approximately \$2.4 million in additional compensation related to a mine reclamation project. Former AAG Ross Kopperud conducted a four-week hearing of this claim before Hearing Officer (and former judge) Mark Rowland, who denied the contractor's claim. The hearing officer instead found the contractor owed the state approximately \$400,000. DOT&PF's commissioner adopted this finding, and it was later affirmed by the superior court.

One basis for the finding against the contractor was that the contractor intentionally misrepresented to DNR the amount of dirt it excavated in order to secure an additional \$182,806 to which it was not entitled.

AAG Jeff Stark represented the State before the Alaska Supreme Court.

Airport Design Dispute Resolved. A dispute over the design of the new Concourse C passenger terminal at the Ted Stevens Anchorage International Airport has also concluded, with the State collecting \$12.4 million dollars from the design team. Two design subcontractors and the prime construction contractor also settled with the State and collected amounts the parties agreed were owed to them, finally ending the series of interrelated claims concerning this construction project. AAG Gary Gantz represented the State, assisted by Chief AAG Jim Cantor, outside counsel Bruce Gagnon, and paralegal Sherene Jensen.

DOT&PF settled a claim for additional compensation submitted by the contractor that designed and built the Glenn Highway/Parks Highway interchange. The claim concerned the impacts of subsurface conditions the contractor claimed could not have been anticipated as well as expenses related to the relocation of a natural gas line. Jim Cantor and Jeff Stark assisted DOT&PF.

Airports

Bonds Issued to Finance Project. AIDEA issued approximately \$63 million in bonds to finance a new rental car facility at the Ted Stevens Anchorage

International Airport, and construction has begun. The facility will be constructed and operated by a private developer. The bonds will be repaid with a passenger facility charge imposed by the state on each car rental transaction. The facility will house nine rental car operations. John Steiner worked more than five years on this project, devoting particularly long hours this summer and fall to financing issues. AAG Brian Bjorkquist also assisted as counsel to AIDEA.

New Regulations Prepared. AAG John Steiner helped the rural airport system and the international airport system develop new regulations governing Alaska's airports. This 400-page set of regulations is now being reviewed by the Legislation and Regulations Section.

Condemnations

Wasilla/Parks Highway. The Transportation Section has settled two out of three condemnation cases stemming from the expansion of the Parks Highway near Wasilla. The first case that settled had been tied up in bankruptcy since a contentious hearing before a master concerning the compensation owed for the property taken. AAG Jeff Stark represented the state in that matter. AAG Susan Urig settled a second case. AAG Gary Gantz will try a third condemnation from the same highway project before a jury in February.

Kenai River Bridge. AAG Peter Putzier is preparing to represent the state in December in a master's hearing to determine the amount owed a landowner in Soldotna for a parcel of land taken temporarily to allow construction of a new bridge over the Kenai River.

Fairbanks. AAG Leone Hatch settled a condemnation that took a parcel of land in Fairbanks for improvements to Airport Way Frontage Road, including a new intersection at Washington. In this case, DOT&PF and the landowner had differed over the impact of the take on a parking lot.

Joan Wilson settled two condemnations involving road improvements at 2nd and Wilber in Fairbanks with an agreement that DOT&PF would construct a parking lot instead of simply paying money for damages.

Other Matters

Air Tanker bid protest. In a bid protest case concerning DNR's lease of tanker aircraft used to fight fires, Gary Gantz obtained a favorable ruling from the superior court, acting as appellate court. Most recently, the superior court granted the State's and the successful bidder's requests for approximately 20% of the attorneys fees they expended defending this appeal. A collateral case remains pending, filed by the disappointed bidder in superior court over the State's administration of the contract awarded to the successful bidder.

Alaska to Assume Federal Highway NEPA Duties.

Congress recently authorized a pilot project allowing five states, including Alaska, to assume the duties of the Federal Highway Administration imposed by the National Environmental Policy Act. This means that for a period of four years these states will be able to conduct their own environmental reviews of highway projects. Peter Putzier has been helping DOT&PF design a state program that will allow DOT&PF to assume these federal duties.

CRIMINAL DIVISION

Anchorage DAO

Dimond Mall shooter convicted in another case: robbery and felony eluding police in 26-mile Palmer chase. Anthony Peralta was wanted for questioning in the March 1, 2005, Dimond Mall fatal shooting of Calil Gross-Minall. On March 4, 2005, he was hiding from police in Wasilla. But that day, the police stopped the vehicle in which he was riding as a passenger. Despite the fact that officers were pointing guns at them, Peralta told the driver to keep driving. She refused. When the police told her to step out of the vehicle, Peralta pushed her out, jumped into the driver's seat, and took off. With troopers following him, he led police on a 26-mile chase along the Old Glenn Highway around Palmer at speeds up to 90 miles per hour. Other vehicles on the road had to swerve to avoid him. At one point in the chase, he passed between two vehicles on the highway, one traveling his way and one traveling the opposite way. This occurred on the *two lane bridge over the Knik River*! When he reached the New Glenn Highway heading into Anchorage, troopers

deployed spike strips that blew out all four of Peralta's tires and stopped him.

In a two-week jury trial, the jury convicted Peralta of vehicle theft for taking the vehicle, robbery in the second degree for pushing the driver out of her vehicle, and felony eluding. In a second stage of the trial, the jury found the aggravating factors of "most serious offense" and "conduct endangering three or more persons" as to the eluding charge. (Peralta had prior convictions that aggravate the presumptive sentence as to the other counts, too.)

ADA John Skidmore tried the case before Judge Philip Volland.

(The District Attorney's Office declined to prosecute Peralta for the shooting death at the Dimond Mall, even though the evidence identified him as the shooter, because the victim also had a gun, which he had fired at Peralta and his two companions, hitting one of them.)

Jury convicts hit-and-run driver who tried to pin it on her sister. On February 21, 2005, at approximately 2:56 a.m., Leanne Wacker was driving a Jeep Grand Cherokee southbound on C Street, approaching the intersection with International Airport Road. The driver of another vehicle had stopped at a red traffic light on International Airport Road heading eastbound, and, when the light turned green for International Airport Road, the driver started into the intersection. Wacker entered the intersection on the red light and struck the other vehicle. Wacker then took off. Fortunately the other driver sustained only a strained neck.

A cab driver witnessed the collision and followed the Grand Cherokee. He saw it stop a few hundred yards to the south due to mechanical problems. There was a large amount of damage to the front end. The driver made no attempt to aid the driver of the vehicle she struck.

There were two people in the Grand Cherokee, Leanne Wacker and her sister. Initially, Wacker's sister, the passenger, got out and went back to the cab driver, claiming that someone else not the Grand Cherokee had struck the vehicle in the intersection and fled the scene. Then the driver, defendant Wacker, got out of the Grand Cherokee. The sisters then got back in the Grand Cherokee, but

they switched seats, with Wacker in the passenger seat and the sister in the driver's seat.

Wacker admitted to police that she had been drinking and that the Grand Cherokee belonged to her, but she denied that she was the driver. She said she had been sleeping in the front passenger seat. Her blood alcohol was .129.

At trial, Wacker testified. She claimed that her sister had been the driver and told the jury that her sister had a record of driving under the influence.

The jury convicted Wacker of assault in the third degree, leaving the scene of the accident, and DUI, as charged. ADA Jennifer Stuart tried the case before Judge Larry Card.

Ex-boyfriend convicted of violating protective order by sending his ex-girlfriend a note written on court pleadings. As of December 28, 2004, Joseph Saucier was under a court order to have no contact with his ex-girlfriend. A judge had ordered him not to have contact with her after Saucier had been convicted of violating a domestic violence protective order that the ex-girlfriend had obtained. But the two were parties to a suit between them over custody of a child and Saucier was acting as his own attorney, so he had to serve copies of pleadings he filed on his ex-girlfriend. He accomplished this by delivering the pleadings to his ex-girlfriend's mother for her to forward. He included in one batch of pleadings, however, a copy of a court order on which he wrote, "Sorry, Mary, 12-15-04 in court. Denied. Thank you."

The ex-girlfriend had, of course, already been served a copy of the order by the court when it entered the order, so there was no legitimate purpose served by Saucier's sending her the order, let alone writing the note on it.

At trial, Saucier defended himself.

ADA Kelly Cavanaugh won a conviction of Saucier in a jury trial before District Judge Brian Clark. Cavanaugh recently transferred to the Anchorage DAO from the Bethel DAO, and this was his first Anchorage trial. The verdict took about 15 minutes. Judge Clark sentenced Saucier to 40 days to serve (360 with 320 suspended) on the new case, to run

consecutive to 30 days revoked for violating probation in the earlier case, for a total of 70 days to serve.

No other criminal division submissions

ADMINISTRATIVE SERVICES DIVISION

Technology Upgrade Project. The project that will bring improved timekeeping and billing, automated case management, replace the beleaguered collections database, and add document management to the civil division was kicked off in late summer with the addition of Rory Darling to the staff as project manager. Since that time, Rory has been busy working on the model of Law's business practices and meeting with various committees related to the project.

Budget. The budget was completed and submitted November 23rd – six days ahead of the revised deadline. There may be changes to decision items between now and the date of print. Thanks to Tracy Maher for all her hard work and extra hours. Law was the first agency to complete the budget!

Information Technology. The State is entering into an agreement with Microsoft in the wake of selecting Microsoft as the network and e-mail standard for state government. The State will spend over \$3 million on the initial licensing agreement, which will include a statewide network assessment and training. At some point, Law will migrate our network from the current Novell environment to Microsoft. This will constitute a major change in the underlying network technology and will require time, training, and planning to ensure minimal disruption to the users.

SAVE THE DATE

March 8-9, 2006 – Civil Division retreat